

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA08-1428

STEPHEN COLEBANK
APPELLANT

V.

T.J. MAXX and CNA INSURANCE
COMPANIES
APPELLEES

Opinion Delivered April 29, 2009

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[No. F511489]

AFFIRMED

LARRY D. VAUGHT, Chief Judge

Appellant Stephen Colebank appeals the Workers' Compensation Commission's decision denying him benefits. He asserts that the Commission's decision is neither supported by sufficient evidence nor based upon a correct application of the law. We disagree and affirm.

The facts in this case are not in dispute. Colebank sustained an admittedly compensable injury to his left hip on October 13, 2005, when he slipped and fell. He was treated at the emergency room by Dr. Ethan J. Schock, an orthopedic surgeon, who diagnosed Colebank with a fractured left hip. The following day, Dr. Schock performed surgery, which included the insertion of a nail, a pin, and a screw. Dr. Schock continued to follow Colebank's care, prescribing medication, ordering two rounds of physical therapy, and ordering tests.

Four months later, on February 17, 2006, Dr. Schock released Colebank to return to work with no restrictions. Dr. Schock wrote that Colebank was noted to be healed on his x-

ray and that his condition was noticeably improved. Dr. Schock anticipated a full recovery and placed Colebank at maximum medical improvement. Finally, based on a full range of motion, full strength, and a lack of degenerative changes or problems with healing on the x-ray, Dr. Schock opined that Colebank had no measurable permanent partial impairment.

Colebank returned to work with another employer in April 2006. However, he continued to experience pain and weakness. In September 2006, he sought additional medical treatment from Dr. Harold Chakales, also an orthopedic surgeon. Dr. Chakales noted that x-rays showed that the left hip was well healed. He also noted that Colebank walked with an antalgic gait, had a smaller left thigh and calf, and had diminished range of motion of the left hip. Dr. Chakales ordered an EMG/NCV test, which was normal. Dr. Chakales ultimately recommended that Colebank have surgery to remove his hardware¹ and ultimately issued an impairment rating of ten percent to the body as a whole.

Colebank filed a claim for workers' compensation benefits, requesting payment for the impairment rating issued by Dr. Chakales. T.J. Maxx controverted the claim. The administrative law judge found that Colebank did not prove that he had sustained a permanent anatomical impairment. The Commission affirmed, and Colebank filed a timely appeal.

When reviewing a decision of the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to its findings and affirm

¹T.J. Maxx represented at the hearing before the ALJ that it agreed to pay for the hardware-removal surgery; however, Colebank testified that he was not ready to proceed with surgery.

that decision if it is supported by substantial evidence. *Inskeep v. Emerson Elec. Co.*, 64 Ark. App. 101, 983 S.W.2d 132 (1998). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Kimbell v. Ass'n of Rehab Indus.*, 366 Ark. 297, 235 S.W.3d 499 (2006). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Inskeep, supra*.

Arkansas Code Annotated section 11-9-704(c)(1)(B) (Repl. 2002) provides that “[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.” As pointed out by Colebank, this court has recently held that “there is no requirement that medical testimony be based solely or expressly on objective findings, only that the record contain supporting objective findings.” *Singleton v. City of Pine Bluff*, 97 Ark. App. 59, 244 S.W.3d 709 (2006).

Colebank argues that the Commission's decision is neither supported by substantial evidence nor based upon a correct application of the law. He contends that the Commission erred in giving more weight to Dr. Schock's opinion because there are no objective findings to support it, while Dr. Chakales's opinion is supported by objective findings, i.e., antalgic gait, measured atrophy of the left calf and thigh, passive range-of-motion testing, and the existence of hardware in his body. We disagree.

This is a dueling-doctors case. The Commission was presented with the differing opinions of Dr. Schock, who opined that Colebank was not entitled to an impairment rating, and Dr. Chakales, who opined that Colebank was entitled to a ten-percent rating. The Commission's decision specifically addressed the opinions of both doctors. The Commission

found that Dr. Chakales failed to indicate whether the impairment rating he issued was based on passive or active range-of-motion tests. The Commission also found that Dr. Schock's opinions were entitled to more weight because his reports stated that Colebank's range of motion was "full," and that a rating could not be assessed based on Colebank's physical findings and under the AMA guide for evaluating impairment.

We hold that substantial evidence supports the Commission's conclusion to afford more weight to Dr. Schock's opinion. First, Dr. Schock was the treating physician and performed surgery on Colebank, which alone can be the basis for affirming. *See Guy v. Breeko Corp.*, 310 Ark. 187, 832 S.W.2d 816 (1992) (per curiam) (noting the court of appeals' decision to affirm the Commission's award of an impairment rating issued by the treating physician—who also performed the surgery—instead of the higher rating issued by another physician—who performed only one evaluation). Also, there are objective and subjective findings identified by Dr. Schock that support his opinion. His reports noted that x-rays demonstrated a well-healed fracture and that Colebank had "full" range of motion.² The reports also reflected that Colebank had full strength and that noticeable improvement had occurred in Colebank's weak hip musculature.

²Colebank's brief questions whether Dr. Schock even performed range-of-motion tests and if he did whether they were active (within the control of Colebank) or passive tests (without the control of Colebank). Two of Dr. Schock's reports reflected that he performed range-of-motion testing. Moreover, Colebank's own testimony established that Dr. Schock performed range-of-motion tests. When asked if Dr. Schock performed range-of-motion tests, Colebank answered, "[h]e did that one time . . . it was before he even sent me to physical therapy." Furthermore, based on Dr. Schock's finding that Colebank's range of motion was "full," it is irrelevant whether the method of testing was passive or active. Assuming it was active, within the control of Colebank, it was "full," or normal. In that case, there would be no reason for Dr. Schock to proceed with passive testing.

Essentially, the Commission was confronted with two opposing medical opinions, and it chose to accept one over the other. It is well settled that it is the province of the Commission to weigh conflicting medical evidence, and the resolution of conflicting evidence is a question of fact for the Commission. *Southeast Ark. Human Dev. Ctr. v. Courtney*, 99 Ark. App. 87, 257 S.W.3d 554 (2007). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witnesses's testimony. *Reeder v. Rheem Mfg. Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992). Here, because the Commission discussed both doctors' opinions, no evidence was arbitrarily disregarded.

Finally, Colebank's reliance upon *Singleton* is misplaced. In *Singleton*, our court held that it was improper for the Commission, in light of an existing objective finding, to reject other evidence of subjective findings that supported physical impairment. *Singleton, supra*. After ignoring objective and subjective findings, the Commission in *Singleton* denied benefits for an impairment rating finding that Singleton "miraculously . . . sustained no permanent structural damage" We reversed and remanded, holding that the Commission's finding was not a substantial basis on which to deny benefits.

Colebank argues, based on *Singleton*, that the Commission erred when it failed to award an impairment rating because it ignored the objective and subjective findings identified by Dr. Chakales. However, *Singleton* is distinguishable from the instant case because it was not a dueling-doctors case. In *Singleton*, there was only one doctor who opined on the issue of whether Singleton was entitled to an impairment rating. The only medical evidence—based on objective and subjective findings—was that Singleton was entitled to an impairment rating. There was no conflicting medical evidence.

Accordingly, we hold that substantial evidence supports the Commission's decision.

Affirmed.

MARSHALL and BAKER, JJ., agree.